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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JUDSON A. BRADFORD

Appeal 2007-3726
Application 10/629,726
Technology Center 3700

Decided: January 9, 2008

Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and
DAVID B. WALKER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Judson A. Bradford (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-13 and 21-33, the only pending claims. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

Appellant's claimed invention is directed to a partition assembly for dividing the space inside a container or box that may be used with containers or boxes of different sizes (Spec. 1:2-4). Claim 1 is illustrative of the claimed invention and reads as follows:

1. A combination comprising:
 - a partition assembly including intersecting slotted partitions arranged in a matrix,
 - a container having walls extending upwardly from a bottom, said bottom and said walls of said container defining an interior of said container;
 - said partitions being of a length such that said partition assembly may fit in said interior of said container without bending said partitions;
 - wherein said partition assembly is held in said interior of said container by at least one hook and loop fastener.

The Examiner relies upon the following as evidence of unpatentability:

Baum	US 4,403,638	Sep. 13, 1983
Cyr	US 4,610,286	Sep. 9, 1986
Sherman	US 5,069,514	Dec. 3, 1991
Cox	US 6,535,606 B2	Mar. 18, 2003

Appellant seeks review of the Examiner's rejections under 35 U.S.C. § 103(a) of claims 1-3, 6-10, 12, 21, 23, 26-28, 31, and 33 as unpatentable over Baum in view of Sherman; claims 4, 5, 9, 11, 13, 22, 24, 25, and 29 as unpatentable over Baum in view of Sherman and Cyr; and claims 30 and 32 as unpatentable over Baum in view of Sherman and Cox.

The Examiner provides reasoning in support of the rejections in the Answer (mailed February 13, 2007). Appellant presents opposing arguments in the Appeal Brief (filed October 11, 2006) and Reply Brief (filed April 11, 2007).

FINDINGS OF FACT

1. Baum discloses a camera bag comprising a main compartment portion 13 into which a rectangular, adjustable camera and camera accessories insert assembly 22 is receivable. Baum's insert assembly 22 comprises a container portion 23 having a bottom wall 24, side walls 25, 26, end walls 27, 28, and a top wall or closure flap 29, all integrally formed of a semi-rigid central panel 41 faced with layers of foam cushion material 42, sandwiched together between fabric coverings 30, 31 (col. 2, ll. 57-67). When in the "set-up" configuration, as shown in Figure 4, side walls 25, 26 extend upwardly from bottom wall 24, and end walls 27, 28, though apparently not attached to or integral with bottom wall 24, extend upwardly from bottom wall 24. The Examiner reads the container of Appellant's claims on the container portion 23 (Ans. 4). Fabric covering layers 30, 31 of container portion 23 are of a soft, wool-like material to which hooks of pressure sensitive strips of VELCRO will adhere (col. 3, ll. 7-11). In other words, the walls of Baum's container 23

have “loop” fastener material secured to the inner and outer surfaces thereof.

2. Baum provides means for dividing the interior of insert container portion 23 into a plurality of compartments of *adjustable* size to snugly accommodate cameras and camera accessories of various sizes and shapes (col. 3, ll. 16-20). To accomplish this, Baum provides a *plurality* of separable partition wall members 34, 35, only two of which are illustrated and described *by way of example* (col. 3, ll. 20-22). The two partition wall members 34, 35 illustrated and described by Baum are of substantially the same height and transverse width as the “set-up” or folded insert assembly container 23 and are preferably made of the same materials as the walls of container portion 23 so as to be “somewhat flexible while at the same time having sufficient resiliency along the outer surfaces to provide a high degree of cushioning for the cameras and camera accessories to be carried within the partitioned subcompartments of container insert assembly 22” (col. 3, ll. 23-32). VELCRO hook or burr strips 36, 37, 38, 39 are sewn to the longitudinal edges of the partition wall members 34, 35 to releasably secure the partition wall members 34, 35 *at any desired position* between the inner surfaces of the container portion 23 (col. 3, ll. 33-38). Each strip 36, 37, 38, 39 is bent around a portion of the longitudinal edge of a partition wall

member and extends outwardly generally perpendicularly from the planar surface of the partition wall member (Fig. 4). Baum emphasizes that “the partition wall members 34, 35, etc.” not only can be positioned to provide subcomponents of adjustable size but also serve to retain the side walls 25, 26 of the container insert assembly 22 in relatively spaced, parallel disposition for use (col. 3, ll. 39-46).

3. Sherman discloses a partition assembly comprising a first group of partition members 12 provided with vertical cuts or slots extending from the top thereof and a second group of partition members 14 provided with vertical cuts or slots extending from the bottom thereof (col. 3, l. 48 to col. 4, l. 6). When assembled to form multiple rows of compartments 10a, as illustrated in Figure 1, each vertical cut of the first group receives a vertical cut from a partition member in the second group so that four joints are formed about each compartment (col. 4, ll. 10-26).
4. Sherman’s slotted partition assembly permits use of any desired number of partitions to provide the desired number and size of compartments and affords flexibility in size and shape (col. 4, ll. 31-37 and 54-58).
5. Sherman also teaches that the storage device or partition assembly can be cut for a customized fit (col. 4, l. 57).
6. Cyr discloses a camera carrying case 10 comprising a shell 11 formed from end walls 21, 22 and sidewalls 31, 32 extending

upward from bottom wall 41 (col. 4, ll. 35-38). Cyr discloses a plurality of dividers 50 for creating four compartments 61, 62, 63, 64 within the case (col. 6, ll. 35-36). Short horizontal tabs 53, 54, 55, 56 having a VELCRO surface consisting of the hook portion are “sewn along the seam of the edge of divider 50” (col. 6, ll. 47-50). Strips 71, 72, 73, 74 having the complimentary VELCRO loop pile for gripping by the hooks on tabs 53, 54, 55, 56 are attached either by adhesives or, preferably, by sewing, to fabric 34 of sidewalls 31, 32 (col. 6, ll. 52-57 and 60-63). By positioning the tabs 53, 54, 55, 56 along the strips 71, 72, 73, 74, the positions of dividers 50 can be changed to modify the sizes of the compartments (col. 6, ll. 57-60).

7. Cox discloses hook and loop portions provided with an adhesive backing and a release backing to cover the adhesive backing (col. 2, ll. 41-44). The hook and loop portions are used to releasably secure a telephone to a telephone shoulder rest or to a sure of a vehicle, desk, or other support surface (col. 2, l. 41 to col. 3, l. 5). Cox provides no teachings with regard to securement of hook and loop portions to the longitudinal edge of a partition wall member.

OPINION

The rejection based on Baum and Sherman

We note, at the outset, that Appellant's Appeal Brief lists all claims rejected based on the combination of Baum and Sherman under a single heading and does not place any claims under a separate subheading, as required by 37 C.F.R. § 41.37(c)(1)(vii), notwithstanding that the Appeal Brief provides a separate argument for claims 2, 7, 10, 28, and 33 on page 9. Appellant's Reply Brief, likewise, does not comply with the requirement of 37 C.F.R. § 41.37(c)(1)(vii) for separate subheadings for claims separately argued. Nevertheless, in the interest of fairness to Appellant, we have considered each of the arguments advanced by Appellant in reaching our decision in this appeal.

Appellant argues that Baum does not disclose or suggest a "partition assembly" as required in each of Appellant's independent claims (Reply Br. 1-3). Citing a plurality of dictionary sources to define "assembly" (Reply Br. 2-3), Appellant reasons that a plurality of partitions do not automatically make a partition assembly (Reply Br. 2) and that "an 'assembly' is not a bunch of parts, but rather a bunch of parts that have been assembled together" (Reply Br. 3). According to Appellant, Baum's partition wall members 34, 35 are not assembled together and thus do not form an "assembly."

Even accepting Appellant's argument that the illustrated and described partition wall members of Baum do not form a "partition assembly," Appellant's argument does not demonstrate error in the Examiner's rejection, because (1) Baum makes it quite clear that other separable partition wall members are contemplated and that only two are

illustrated and described by way of example (Fact 2) and (2) the rejection is based on the combination of Baum and Sherman, not Baum alone.

Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Specifically, the Examiner determines that it would have been obvious to a person of ordinary skill in the art at the time of Appellant's invention "to configure the partitions of Baum to be intersected slotted and arranged in a matrix as taught by Sherman so as to provide a versatile design" (Ans. 4).

Baum's expressed interest in adjustability and versatility of the compartments formed by the partition wall members (Fact 2) makes it clear that Baum contemplates partition configurations that differ from that formed by the specifically illustrated and described partition wall members 34, 35. Moreover, Sherman evidences that the use of vertically slotted partition walls in an adjustable and customizable partition assembly to partition storage space in two dimensions was known in the art at the time of Appellant's invention (Findings 3 and 4). To utilize such a partition technique in the insert container 23 of Baum to enhance the versatility of the storage space by permitting partitioning in two dimensions would involve nothing more than the predictable use of prior art elements according to their established functions, *KSR Int'l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740, (2007), and, as such, would have been obvious to a person of ordinary skill in the art.

Appellant argues that the slotted partition assembly of Sherman would not accommodate cameras and lenses of various sizes and configurations and would not provide sufficient protection for those delicate and fragile camera components (App. Br. 8). Appellant has not explained, and it is not apparent, why this would be the case. Sherman, like Baum, touts adjustability and versatility as important advantages of the disclosed partition assembly and instructs that the number of partitions used will be determined by the desired number and size of compartments (Fact 4). A person of ordinary skill in the art, being “also a person of ordinary creativity, not an automaton,” *KSR*, 127 S.Ct. at 1742, would readily understand how to use the slotted partition technique taught by Sherman, using the required number of partition walls and cutting them if necessary, as taught by Sherman (Fact 5), to customize and configure the compartments within the insert container 23 of Baum to securely contain and protect the camera accessories.

We therefore find no error in the Examiner’s determination that it would have been obvious to configure the partitions of Baum to be slotted and intersected and arranged in a matrix as taught by Sherman. We also find that the partition walls of such a slotted and intersected partition matrix are assembled or fitted with one another and thus form a “partition assembly” as called for in Appellant’s claims.

Appellant’s argument that Baum does not disclose a plurality of first partitions and a plurality of second partitions, as called for in independent claims 10, 12, and 33 (Reply Br. 7), is directed to Baum alone and not to the

combination of Baum and Sherman asserted by the Examiner. As noted above, nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See Merck*, 800 F.2d at 1097. The Examiner relies on the teachings of Sherman for this limitation. For the reasons explained above, we find no error in the Examiner's determination that it would have been obvious to configure the partitions of Baum to be slotted and intersected and arranged in a matrix of a plurality of first and second groups of partitions as taught by Sherman. Appellant's argument thus fails to persuade us the Examiner erred in the rejection.

Appellant acknowledges that the Examiner's reference to "item 32" (Ans. 4) as the component of the hook and loop fastener secured to the partition is ostensibly an inadvertent error and the Examiner must intend to read the second component of the hook and loop fastener on strips 36, 37, 38, and 39 of Baum (App. Br. 9). With respect to claims 2, 7, 10, 28, and 33, Appellant argues that "[t]hese strips clearly do not form extensions of the partitions in the plane of the partitions so [as] to enable those partitions to accommodate varying size containers" (App. Br. 9). This argument is not persuasive of error in the Examiner's rejection, as claims 2, 7, 10, 28, and 33 contain no such limitation. It is well established that limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982).

Appellant also argues that Baum's container portion 23 lacks walls that extend from a bottom, said bottom and said walls defining an interior of

the container, as called for in independent claims 1, 12, 21, 28, and 33 (Reply Br. 3-4). Specifically, Appellant contends that Figures 4 and 6 of Baum show end walls 27, 28 extending not from bottom wall 24 but rather from side wall 26 and that bottom wall 24 and the two walls 25, 26 that extend from bottom wall 24 do not define the interior of a container (Reply Br. 4). Appellant's characterization of the walls of Baum's container portion 23 is not accurate. While end walls 27, 28 are not attached to or integral with bottom wall 24, in the "set-up" condition shown in Figure 4 of Baum, end walls 27, 28 extend upwardly from bottom wall 24 (Fact 1). Moreover, bottom wall 24, end walls 27, 28, and side walls 25, 26, which also extend upwardly from bottom wall 24, define an interior of container portion 23, as called for in Appellant's independent claims 1, 12, 21, 28, and 33. Appellant's argument thus does not demonstrate error in the Examiner's rejection.

Appellant argues that Baum does not disclose partitions that do not bend when inserted. Thus, according to Appellant, Baum does not satisfy the limitation "partitions being of a length such that said partition assembly may fit in said interior of said container without bending said partitions" in claim 1 (Reply Br. 4). While Baum does disclose partition wall members 34, 35 that are "somewhat flexible" (Fact 2), Appellant's claim 1 does not exclude flexible partitions. The limitation alluded to by Appellant is directed to the length of the partitions, not their rigidity. Baum describes the partition wall members 34, 35 as being of substantially the same transverse width as the "set-up" insert assembly container portion 23 and as retaining

the side walls 25, 26 of the container portion in relatively spaced, parallel disposition (Fact 2). We thus find that the partition wall members 34, 35 of Baum are of a length such that they may fit in the interior of container portion 23 without bending, as called for in claim 1. Appellant's argument thus does not persuade us of error in the Examiner's rejection.

Appellant argues Baum lacks a hook and loop fastener having a first component secured to an inner surface of one of the container walls, as required in claim 2 (Reply Br. 5). Specifically, Appellant points out that fabric coverings 30, 31, which are made of material to which the hooks or burrs of strips 36, 37, 38, 39 will adhere, are actually part of the walls of the container and thus cannot also be a component that is secured to an inner surface of one of the container walls (Reply Br. 5). The walls of Baum's container portion 23 are all integrally formed of a semi-rigid central panel 41 faced with layers of foam cushion material 42, sandwiched together between fabric coverings 30, 31; consequently, we find the walls of Baum's container 23 have "loop" fastener material secured to the inner and outer surfaces thereof (Fact 1). Appellant's argument fails to persuade us of error in the Examiner's rejection.

Appellant also argues that Baum's hook or burr strips 36, 37, 38, 39 do not function "as a flexible extension of said one of said partitions" as called for in claim 6 (Reply Br. 6). Appellant's argument appears to presume claim 6 requires that the second component of the hook and loop fastener extend so as to increase the length (or transverse width) of the partition. Claim 6, however, contains no such limitation. Claim 6 does not

specify in what direction the second component of the hook and loop fastener extends from the partition. Baum's hook or burr strips 36, 37, 38, 39 extend outwardly, in a perpendicular direction, from the surface of the partitions (Fact 2) and thus function as flexible extensions of the partitions. This argument, too, fails to demonstrate reversible error in the Examiner's rejection.

Appellant's argument that strips 36, 37, 38, 39 do not function as planar extensions of partition wall members 34, 35 (Reply Br. 9) likewise fails in demonstrating Examiner error in the rejection of claim 26. While claim 26 requires the second component to function as a "generally planar extension" of one of the partitions, claim 26 does not specify in which direction the second component must extend from the partition. Each of strips 36, 37, 38, 39 is a generally planar extension in that it is planar and extends outwardly, in a perpendicular direction, from the surface of the partition (Fact 2).

Appellant further argues that Baum does not disclose a tab that may be bent to either side of a slotted partition to engage the first component of the two part hook and loop fastener, as called for in claim 10 (Reply Br. 7-8). Close inspection of Baum's Figure 4, however, reveals that each of strips 36, 37, 38, 39 is bent around a portion of the longitudinal edge of one of the partition wall members 34, 35 and is bent to extend generally perpendicularly from either planar surface of the partition wall member (Fact 2). We therefore find that the limitation alluded to by Appellant is satisfied by Baum. The argument fails to demonstrate error in the rejection.

Appellant argues that Baum does not satisfy the limitation of claims 7 and 27 that “said second component of said hook and loop fastener,” that is, the component secured to one of the partitions, has an exterior surface which has a plurality of *loops* (Reply Br. 6-7). Indeed, as pointed out by Appellant (Reply Br. 7), the component of the hook and loop fastener secured to the partition wall members 34, 35 is hook or burr strip 36, 37, 38, or 39 (Fact 2), which comprises the hook component of the hook and loop fastener, not a plurality of loops. The Examiner does not respond to Appellant’s argument, electing to respond to Appellant’s Reply Brief simply with a notation that the Reply Brief “has been entered and considered” (Communication mailed May 29, 2007). In addressing this limitation of claims 7 and 27, the Examiner finds that Baum discloses a second component (item 32) having an exterior surface with a plurality of loops (Ans. 5 and 8). The position of the Examiner with respect to the “second component” is flawed in two respects. First, item 32 (burr strip 32) is secured not to the partitions but to the closure flap 29 and thus does not correspond to the “second component” as defined in claims 7 and 27. Second, burr strip 32 comprises hooks or burrs and not loops.

In light of the above, we are constrained to conclude that the Examiner’s position in rejecting claims 7 and 27 as unpatentable over Baum in view of Sherman is flawed and that the rejection therefore cannot be sustained. We leave it to the Examiner, upon return of jurisdiction of this application to the primary examiner, to determine whether it would have been obvious to reverse the hook and loop components of the strips 36, 37,

38, 39 and fabric covering layers 30, 31 so that the strips 36, 37, 38, 39 comprise the plurality of loops, as called for in claims 7 and 27, as this issue is not presented to us for review.

In light of the above, we conclude that Appellant's arguments demonstrate error in the Examiner's rejection of claims 7 and 27 as unpatentable over Baum in view of Sherman but fail to demonstrate error in the rejection of claims 1-3, 6, 8-10, 12, 21, 23, 26, 28, 31, and 33 as unpatentable over Baum in view of Sherman. The rejection is sustained as to claims 1-3, 6, 8-10, 12, 21, 23, 26, 28, 31, and 33 and reversed as to claims 7 and 27.

The rejection based on Baum in view of Sherman and Cyr

Claims 4, 5, 24, and 25 require that the second component of the hook and loop fastener be *adhesively* secured to one of said partitions. Baum discloses that the hook or burr strips 36, 37, 38, 39 are "sewn" to the longitudinal edges of partition wall members 34, 35 (Fact 2). Baum does not teach adhering the strips 36, 37, 38, 39 to the partitions. The Examiner finds that Cyr teaches adhesives as an alternative equivalent to sewing for securement of loop fasteners to the inner walls of a container (Ans. 8). On the basis of that finding, the Examiner determines that it would have been obvious to a person of ordinary skill in the art at the time of Appellant's invention to secure the second component of the hook and loop fastener of Baum to the partition by adhesives, rather than by sewing, as an alternative equivalent means of connection (Ans. 8).

While it is true that the analysis supporting the legal conclusion of obviousness “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ,” we must also keep in mind that “there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR*, 127 S.Ct. at 1741. In this case, the articulated reasoning for the modification proposed by the Examiner is the recognized equivalence of sewing and adhesives as a means for securing hook and loop fastener components. The flaw in the Examiner’s reasoning is that neither Cyr nor Baum teaches the equivalence of sewing and adhesives for securing hook and loop fastener component tabs or strips to the longitudinal edge of a partition wall member.

We find it significant that Cyr expressly cites adhesives as a less preferred alternative to sewing for securing the loop pile tabs 71, 72, 73, 74 to the planar inner surface of the sidewalls 31, 32 but does not similarly cite adhesives as an alternative to sewing for securing the hook pile tabs 53, 54, 55, 56 to the edge of the dividers 50 (Fact 6). Rather, Cyr, like Baum, teaches sewing the tabs to the edge of the dividers. Appellant identifies an important distinction between the securement of the tabs 71, 72, 73, 74 to the inner surface of the sidewalls 31, 32 and the securement of the tabs 53, 54, 55, 56 to the edge of dividers 50 of Cyr or strips 36, 37, 38, 39 to partition wall members 34, 35 of Baum (Reply Br. 10). Specifically, while there is a large planar contact area between the tabs 71, 72, 73, 74 and the

inner surface of the sidewalls 31, 32, there is very little contact between the sides of dividers 50 or partition wall members 34, 35 and tabs 53, 54, 55, 56 or strips 36, 37, 38, 39. In light of this distinction, and Cyr's pointedly different teachings with regard to the securement of the loop pile tabs to the sidewalls 31, 32 versus that of the hook pile tabs to the edge of divider 50, we cannot conclude that Cyr establishes an equivalence between sewing and adhesives for securing hook and loop components to the longitudinal edge of a divider or partition wall member. Consequently, while the subject matter of claims 4, 5, 24, and 25 may in fact have been obvious to a person of ordinary skill in the art at the time of Appellant's invention, the prior art references and accompanying reasoning proffered by the Examiner are insufficient to establish that this is the case. We cannot sustain the rejection of these claims as unpatentable over Baum in view of Sherman and Cyr.

Claims 9, 11, 13, 22, and 29, however, do not include a limitation that the second component of the hook and loop fastener is adhesively secured to one of the partitions. Thus, Appellant's argument with respect to that limitation cannot be relied upon to demonstrate the patentability of claims 9, 11, 13, 22, and 29. *See Self*, 671 F.2d at 1348. The Examiner seemingly relies on Cyr in rejecting claims 9, 11, 13, 22, and 29 simply for a teaching to modify Baum to provide a plastic inner core to the partition wall members of Baum (Ans. 8) and Appellant does not challenge the Examiner's determination that such a modification would have been obvious.

In light of the above, Appellant's argument does not demonstrate error in the Examiner's rejection of claims 9, 11, 13, 22, and 29 as unpatentable

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over Baum in view of Sherman and Cyr. The rejection is sustained as to these claims.

The rejection based on Baum in view of Sherman and Cox

Appellant's claim 30 requires that the second component of the hook and loop fastener, namely, the component secured to the partitions, have a removable backing covering an adhesive surface, the adhesive surface adapted to attach to the ends of the partitions. Appellant's claim 32 requires that the component of the hook and loop fastener secured to one of the walls of the container have a removable backing covering an adhesive surface, the adhesive surface being secured to an inner surface of one of the walls. The Examiner concedes that Baum lacks such a removable backing covering an adhesive surface on its hook and loop fastener components, but determines that it would have been obvious to one of ordinary skill in the art to modify Baum "to have a peel-back adhesive as taught by Cox so as to provide a convenient means of implementing said hook and loop fasteners" (Ans. 9).

Cox does evidence that hook and loop portions having adhesive backings and release backings covering said adhesive backings were known at the time of Appellant's invention (Fact 7). What is lacking in the Examiner's rejection, however, is any reason for securing by means of an adhesive backing either the hook or burr strips 36, 37, 38, 39 to the longitudinal edge of partition wall members 34, 35 or the fabric wall covering layers 30, 31, which provide the loop portion to be gripped by the hooks or burrs of strips 36, 37, 38, 39, to the walls of container portion 23. The rejection of claims 30 and 32 as unpatentable over Baum in view of Sherman and Cox cannot be sustained.

CONCLUSION

The decision of the Examiner to reject claims 1-13 and 21-33 is affirmed as to claims 1-3, 6, 8-13, 21-23, 26, 28, 29, 31, and 33 and reversed as to claims 4, 5, 7, 24, 25, 27, 30, and 32.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

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